

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK URIARTE,)	Civil No. 10cv498 L(AJB)
)	
Plaintiff,)	ORDER STRIKING FIRST
)	AMENDED COMPLAINT
v.)	
)	
CITY OF CALEXICO,)	
)	
Defendant.)	
_____)	

On April 1, 2010, defendant filed a motion to dismiss the complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) which was set for hearing on May 24, 2010. Plaintiff was required to file an opposition to defendant's motion no later than May 10, 2010 but did not do so. On May 27, 2010, counsel for plaintiff, Michael McGill and Carolina Veronica Diaz, each filed a declaration stating they did not receive an email from the Court's Electronic Filing system or from opposing counsel notifying them of the filing of defendant's motion to dismiss. Mr. McGill's declaration also states that "[u]nless the Court intervenes and orders otherwise, I will immediately prepare an opposition to Defendants [sic] Motion to Dismiss, and I will have it filed by Tuesday, June 1, 2010." (McGill Declar. at ¶ 9.) Plaintiff did not file an opposition to the motion to dismiss on June 1, 2010, but instead attempted to file a hard-copy of a First

1 Amended Complaint with the Clerk of the Court on June 2, 2010.¹

2 Plaintiff's filing of declarations requesting that the "Court intervene" is ineffectual and
3 improper. If a party would like a form of relief or a decision from the Court, the party must
4 move for a ruling and may not file a stand-alone declaration with the expectation that the Court
5 will act in the absence of a motion. In this case, plaintiff could have filed an ex parte motion
6 seeking leave to file a late response or for an extension of time in which to respond to
7 defendant's motion. He has done neither. As a result, defendant's motion to dismiss remains
8 unopposed.

9 Further, plaintiff's attempt to file an amended complaint also is procedurally flawed. To
10 amend as a matter of right, plaintiff must have filed his amended complaint within 21 days after
11 serving it or within 21 days after defendant filed its motion to dismiss. FED. R. CIV. P.
12 15(a)(1)(A), (B). Because the motion to dismiss was filed on April 1, 2010, plaintiff's attempt to
13 amend his complaint as a matter of right on June 2, 2010 is untimely. But Rule 15(a)(2) allows a
14 party to amend its pleading with leave of court or opposing counsel's written consent after the
15 period for amendment as a matter of course has expired. *See* FED. R. CIV. P. 15(a)(2) ("In all
16 other cases, a party may amend its pleading only with the opposing party's written consent or the
17 court's leave. The court should freely give leave when justice so requires.") If plaintiff would
18 like to file an amended complaint, he must do so under Rule 15(a)(2) and in conformity with the
19 Civil Local Rules.

20 Counsel is admonished that compliance with the Federal Rules of Civil Procedure, the
21 Civil Local Rules and the E-Filing Manual is required at all times. Any further failure to comply
22 with the rules of court may lead to penalties under Local Rule 83.1.


23 Based on the foregoing, **IT IS ORDERED** striking plaintiff's First Amended Complaint.
24 **IT IS FURTHER ORDERED** that the Court finds defendant's motion to dismiss the complaint
25 suitable for determination on the papers submitted and without oral argument pursuant to Civil
26

27 ¹ Although case initiating documents must be filed in paper format at the Clerk's
28 Office, all subsequent documents must be filed electronically. E-Filing Manual §§ 1(b) and 2(c).
Plaintiff's attempted filing of an amended complaint over the counter is inappropriate.

1 Local Rule 7.1(d)(1).

2 **IT IS SO ORDERED.**

3 DATED: June 3, 2010

4 
5 M. James Lorenz
6 United States District Court Judge

7 COPY TO:

8 HON. ANTHONY J. BATTAGLIA
9 UNITED STATES MAGISTRATE JUDGE

10 ALL PARTIES/COUNSEL

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